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The D.C. "Voting Rights" Bill: A Clearly Unconstitutional Act of Partisan Symbolism

Executive Summary

- S. 160, the District of Columbia House Voting Rights Act of 2009, is pending in the Senate. The bill seeks to fundamentally change the structure of the federal legislature through mere legislation. Such a change may only be accomplished by constitutional amendment, and S. 160 is, therefore, clearly unconstitutional.
- Article I, Section 2 of the Constitution provides that the House of Representatives shall be composed of members elected from "the several states." The District of Columbia is not a "state," and Congress may not grant the District full membership in the House without amending the Constitution.
- Congress enjoys broad legislative power over the District and all other federal enclaves under Article I, Section 8 of the Constitution. That power to control the affairs of the District, however, does not permit Congress to alter the composition of the federal legislature.
- If this bill becomes law and is not struck down in the courts, there would be nothing to prevent a party temporarily in the majority from creating additional congressional districts for other "federal enclaves" to pack the Congress with their partisans. The Framers would be appalled that this Congress would interpret the Constitution as authorizing such a power-grab.
- Members of Congress are bound by an oath of office that requires them to "support the Constitution." Congress's obligation to interpret and apply the Constitution to its official acts is as important as the duties to the Constitution borne by the president and by the Supreme Court. It would be grossly irresponsible for members of Congress to knowingly vote in favor of an unconstitutional law—only to rely on the courts to invalidate it and defend the Constitution.
- The Framers of our Constitution placed the seat of the federal government in the District and consciously provided that the District would not have representation in the Congress. This structural choice was intended to protect the independence of the federal government, and to ensure that no one state has excessive power over the federal government.
- Modern experience demonstrates the wisdom of the Founders' vision. District residents have a powerful voice in Congress through the Office of the District of Columbia Delegate. Contrary to popular complaints about "taxation without representation," District residents continue to benefit generously from the presence of the federal government in the District. The District receives twice as much per capita in federal aid dollars than the national average, and the recent experience with the "stimulus plan" only reaffirms the District's privileged access to federal funds, notwithstanding its lack of a formal member in Congress.

Introduction

S. 160, the District of Columbia House Voting Rights Act of 2009, seeks to award the District of Columbia a full voting seat in the House of Representatives by ordinary legislation, rather than by constitutional amendment. Because the Constitution specifically provides that the House "shall be composed of Members chosen … by the People *of the several States*," Congress cannot create a full member seat for the District through mere legislation. S. 160 is clearly unconstitutional.

The constitutional defect in S. 160 cannot be left to be addressed by the courts. There are serious questions whether the likely litigants in such a court challenge would have standing to bring a case, and those questions are not adequately addressed by the current language in the bill providing for expedited review before the Supreme Court.

Nor is it clear that the underlying policy goal—replacing the office of the District of Columbia Delegate with a full voting member of the House—is a wise one. The Founders clearly intended to create the District as a unique entity that would protect the independence both of the states and of the federal government. The Founders' deliberate design ought not to be cast aside lightly, especially where, as recent experience shows, the Delegate has been a highly effective representative for the interests of District residents in Congress.

S. 160 is Unconstitutional

The Constitution Provides that the House of Representatives Shall Be Composed of Members Chosen "By the People of the Several States"

Article I of the Constitution provides that the legislative powers "shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives." The composition of the House is set forth in Article I, Section 2:

> The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch in the State Legislature.[1]

The text could not be clearer: membership in the House is reserved to representatives "of the several *States*." The proviso that the voting qualifications of the "Electors" of such representatives be the same as what is required to vote for "the most numerous Branch in the State Legislature" only reinforces the point. From the time of its creation in 1801, the District of Columbia had no independent government—and thus no separate "Legislature"—until the mid-20th century.[2]

As with any interpretation of the Constitution, the inquiry starts with the text of the relevant provisions. If the text is clear, and clearly answers the question, the matter is ordinarily closed.

[1] U.S. Constitution Article I, Section 2, Clause 1.
[2] While the District now has an established municipal government, the only entity in the District that approximates a "legislature" is its unicameral city council.

Article I, Section 2 of the Constitution clearly limits membership in the House to representatives of "States." The District is not a state. Unless the Constitution is amended, no representative from the District may be a "Member" of the House.

Congress Cannot Alter the Composition of the Federal Legislature by Mere Legislation

In the face of this clear constitutional statement on the qualifications for House membership, proponents of S. 160 argue that the Constitution gives broad power to legislate on matters pertaining to the District, and that this power is broad enough to permit Congress to create a congressional district covering Washington, D.C., and thereby award the District a full member seat in the House.

They rest this claim on the language of the "District Clause," found in Article I, Section 8 of the Constitution:

> The Congress shall have the power… To exercise exclusive legislation in all cases whatsoever, over such district (not exceeding ten miles square) as may, by cession of particular states, and the acceptance of Congress, become the seat of the government of the United States, and to exercise like authority over all places purchased by the consent of the legislature of the state in which the same shall be, for the erection of forts, magazines, arsenals, dock-yards, and other needful buildings.[3]

It is true that this District Clause gives Congress "extraordinary and plenary power" over the District.[4] No responsible interpreter of the Constitution, however, would pretend that this power enables Congress to take any action whatsoever, whether to alter the composition of the federal government or to subtract from the rights and privileges of the people or the states, so long as there is a plausible connection to regulation of the District.[5] Yet that is the logical endpoint of the "District Clause" arguments made by many proponents of S. 160.

Under the plain text of Article I, Section 8, the plenary authority granted to Congress over the District is exactly the same as the authority Congress may exercise over any federal enclave, such as "forts, magazines, arsenals, dock-yards, and other needful buildings" established anywhere in the nation. If the claim that the District Clause authorizes the creation of a congressional district by mere legislation is to be taken seriously, the very same constitutional text on which proponents of S. 160 rely would also have to be understood as authorizing Congress, through mere legislation, to create House seats for any such federal enclave.

But it should be obvious that this could not have been the Founders' intention.

> It would be ridiculous to suggest that the delegates to the Constitutional Convention or ratification conventions would have worked out such specific and exacting rules for the

[3] U.S. Constitution Article I, Section 8, Clause 17.
[4] *United States v. Cohen*, 733 F.2d 128, 140 (D.C. Cir. 1984).
[5] *Palmore v. United States*, 411 U.S. 389, 397-398 (1973) ("Congress may exercise within the District all legislative powers that the legislature of a State might exercise within the State; and may vest and distribute the judicial authority in and among courts and magistrates, and regulate judicial proceedings before them, as it may think fit, *so long as it does not contravene any provision of the Constitution of the United States*.") (emphasis added).

> composition of Congress, only to give the majority of Congress the right to create a new form of voting members from federal enclaves like the District. It would have constituted the realization of the worst fears for many delegates, particularly Anti-Federalists, to have an open-ended ability of the majority to manipulate the rolls of Congress and to use areas under the exclusive control of the federal government as the source for new voting members.[6]

The proponents of S. 160 argue that this legislation is motivated not by a desire to exploit majority power but to provide a permanent voice in Congress for the approximately 600,000 residents of the nation's capital. But the constitutional interpretation they advance in claiming authority to create a House seat through mere legislation is not confined only to such purportedly "benign" uses. Once accepted, this interpretation of Article I Section 8 admits of no limiting principle to distinguish the case of the District from a more sinister effort by a faction temporarily in the majority to permanently aggrandize its power.

Notwithstanding the clear perils of such an expansive view of the District Clause, proponents of S. 160 have pointed to cases in which the courts have upheld federal taxation of District residents, or have approved congressional action permitting District residents to sue in federal court under the courts' "diversity jurisdiction," which the Constitution extends to suits "between Citizens of different states,"[7] as evidence that the District Clause allows Congress to expand the Constitution's references to "states" to include the District.[8] Their reliance on these cases, however, is misplaced.

In *Loughborough v. Blake*, Chief Justice John Marshall rejected the argument that District residents were exempt from direct federal taxation because Article I, Section 2 commands that taxes "shall be apportioned *among the several States* … according to their respective numbers." Writing for a unanimous Court, Chief Justice Marshall noted that Congress's power of taxation comes from Article I, Section 8, which grants Congress the power "to lay and collect taxes, duties, imposts and excises."[9] "This grant is general, without limitation as to place. It, consequently, extends to all places over which the government extends."[10] According to the Court, the Apportionment limitation in Section 2 requires that all "states" be taxed proportionately with their population, but it does not carve out geographic exceptions to the general taxation power so as to prohibit, or for that matter require, taxation of the District or other non-state territories within the United States.[11]

Crucially, the result in *Loughborough* did not rest on a conclusion that the District Clause authorized to treat the District "as if it were a state" for purposes of taxation. Instead, the Court's holding relied on a straightforward interpretation of the Constitution's grant to Congress of nation-wide taxation power. In fact, Chief Justice Marshall's opinion provides a powerful rebuttal of the popular argument that the District's lack of a full voting member of the House

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[6] Jonathan Turley, *Too Clever By Half: The Unconstitutionality Of Partial Representation Of The District Of Columbia In Congress*, 76 GEO. WASH. L. REV. 305 (2008).
[7] U.S. Constitution Article III, Section 2.
[8] *See* Senate Report 110-123, June 28, 2007, to accompany S. 1257, at 3-4.
[9] U.S. Constitution Article I, Section 8, Clause 1.
[10] *Loughborough v. Blake*, 18 U.S. 317, 318-19 (1820)
[11] *Id.* 322-24.

amounts to "taxation without representation" and an affront to the Constitution and to the founding principles of the American Republic:

> The difference between requiring a continent, with an immense population, to submit to be taxed by a government having no common interest with it, separated from it by a vast ocean, restrained by no principle of apportionment, and associated with it by no common feelings; and permitting the representatives of the American people, under the restrictions of our constitution, to tax a part of the society … *which has voluntarily relinquished the right of representation, and has adopted the whole body of Congress for its legitimate government, as is the case with the district*, is too obvious not to present itself to the minds of all. Although in theory it might be more congenial to the spirit of our institutions to admit a representative from the district, it may be doubted whether, in fact, its interests would be rendered thereby the more secure; and certainly the constitution does not consider their want of a representative in Congress as exempting it from equal taxation.[12]

The precedent of Congress's extension of the federal courts' diversity jurisdiction to District residents provides a slightly better analogy for those who argue that Congress may interpret the constitutional term "state" to include the District. But a close reading of the controlling Supreme Court ruling in *National Mutual Insurance Co. v. Tidewater Transfer Co.* shows that at least six of the justices who ruled on that case—and likely all nine justices—would find unconstitutional the current effort to create a House seat through legislative expansion of the term "state" in Article I, Section 2 to include the District of Columbia.

The question presented in *Tidewater Transfer Co.* was whether Congress could extend the federal courts' diversity jurisdiction to cases involving District residents, notwithstanding the language in Article III providing that federal court jurisdiction extended to disputes "between Citizens of different states." In an opinion authored by Chief Justice John Marshall in 1805, the Supreme Court had unanimously rejected the claim that District residents enjoyed access to the federal courts on diversity grounds.[13] Nevertheless, Congress passed a statute expressly extending diversity jurisdiction to District residents in 1940,[14] which appellants in *Tidewater Transfer Co.* argued was a violation of Article III, Section 2.

The Justices produced four separate opinions in *Tidewater Transfer Co.*, none of which commanded a majority. While there were five votes in support of the ultimate holding that District residents could sue on diversity grounds in the federal courts, only three justices concluded that the legislation providing that jurisdiction was legitimate as an exercise of

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[12] *Id.* 324-25 (emphasis added).

[13] *Hepburn v. Ellzey*, 6 U.S. (2 Cranch) 445 (1805). Diversity jurisdiction for the federal courts was deeply controversial at the time of the Framing, with opponents of such jurisdiction arguing that it would permit the federal judiciary to encroach on state power by deciding matters of state law. *See generally Tidewater Transfer Co.*, 337 U.S. 582, 631-36 (1949) (Vinson, C.J., dissenting) (summarizing the debates over Article III and the arguments for strict limits on federal judicial power to preserve the power of state governments). Extension of federal courts' diversity jurisdiction to residents of the District subjects residents of any state to federal court jurisdiction in any dispute that arises with a District resident. Whereas the federal courts might be conceived as a more neutral tribunal than the home-state court of one party in an ordinary diversity case, the federal court would have been seen as the "home court" of a District resident, arguably putting District residents at an advantage in any dispute with citizens of the several states.

[14] Act of April 20, 1940, 54 Stat. 143.

congressional power under the District Clause of Article I, Section 8.[15] The two concurring Justices who provided the crucial votes for the ultimate result in the case flatly rejected the plurality's argument that the District Clause authorized Congress to legislatively expand the jurisdiction of the federal courts beyond the bounds set by Article III. They, along with the four other Justices who dissented entirely from the result in the case, found the 1940 legislation unlawful, and strenuously objected to the plurality's argument that Congress was permitted to legislatively extend federal court jurisdiction beyond Article III's limitations on the judicial power. Judicial acceptance of such an extension, in the opinion of the concurring Justices, "is a dangerous doctrine which would return to plague both the district courts and ourselves in the future."[16] Rather, Justice Rutledge's concurrence argued that the Constitution itself used the term "state" to mean different things in different contexts, and that a more expansive reading—one that would treat citizens of the District as citizens of a "state"—should be given to Article III, Section 2.

Stated simply, *Tidewater Transfer Co.* does not support the claim that Congress may legislatively treat the District as if it were a "state" under the Constitution. At least six Justices rejected that view as "dangerous," and even the three Justices who opined that the District Clause authorized such legislation sought to limit the impact of their view by confining it to legislation that neither involved an "extension or denial of any fundamental right" nor "substantially disturb[ed] the balance between the Union and its component states."[17] Granting the District a full voting member seat in the House fails on both counts—creation of a full voting member seat for the Federal City roils the relationship "between the Union and its component states," and it arguably involves the extension of a "fundamental right."[18]

Although *Tidewater Transfer Co.* does not support the arguments of S. 160's proponents, it does further highlight the fact that expansive legislative interpretations of the term "state" as it appears in the Constitution will not likely be confined to the District of Columbia. Following the Supreme Court's decision in *Tidewater Transfer Co.*, lower courts extended federal diversity jurisdiction to the territories, concluding that the reasoning underpinning the Supreme Court's holding in *Tidewater* was equally applicable to those territories.[19] If S. 160 were to become law and survive judicial review, full voting membership for the U.S. territories that currently send delegates to Congress will likely not be far behind.

Nor will the effects of this bill be necessarily limited to the House. If Article I's reference to "the several states" may be legislatively reinterpreted to include the District for purposes of House membership, the same may be said of representation in the Senate. S. 160 purports to limit its reach by expressly stating that the District shall not be treated as a state for purposes of Senate representation, but this legislative language cannot prevent a future Congress from legislatively awarding Senate seats to the District.

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[15] *See Tidewater Transfer Co.*, 337 U.S. 582, 600 (1949) (plurality opinion of Jackson, J.).
[16] *Id.* at 626 (Rutledge, J., concurring).
[17] *Id.* at 585. (plurality opinion of Jackson, J.).
[18] *See* Congressional Research Service Report to Congress, RL33824, "The Constitutionality of Awarding the Delegate for the District of Columbia a Vote in the House of Representatives or the Committee of the Whole," at CRS, 13-14, January 28, 2009. [Hereinafter "CRS Report on Constitutionality"]
[19] *See, e.g. Detres v. Lions Building Corp.*, 234 F.2d 596 (7th Cir. 1956)

The Constitutional Flaws of S. 160 Cannot Be "Left for the Courts to Decide"

Many proponents of S. 160 in the Senate acknowledge that its constitutionality is doubtful, but urge Senators to nevertheless vote in favor of the measure and "let the courts decide" the constitutional questions that the bill raises. Indeed, it can seem expedient, when faced with unconstitutional bills that have vocal and passionate supporters, to vote in favor and trust that the judiciary will resolve the constitutional questions. But such votes do not fulfill members' obligation "to support the Constitution"—an obligation that members affirm with an oath upon taking office,[20] and which requires members to exercise their best judgment as to the constitutionality of legislation presented to them and to act according to that judgment. Failure by members to exercise their independent constitutional judgment also threatens the proper balance the Founders intended to exist among the three coordinate branches of the federal government, abdicating the legislature's proper place as a joint interpreter with the courts of our Constitution.

Voting in favor of a constitutionally flawed law is especially hazardous here, where there is a significant risk that the courts will not be able to rule on the constitutionality of this Act for the foreseeable future.

In order for a legal challenge to the constitutionality of S. 160 to be heard in federal court, a suit would need to be brought by a party with standing to do so under the Supreme Court's rulings interpreting Article III of the Constitution. S. 160 contains an expedited judicial review provision that provides for accelerated review before the District Court for the District of Columbia, followed by direct appeal to the U.S. Supreme Court. But recent Supreme Court decisions on standing cast significant doubt on whether any member of Congress—or any individual voter—would have standing to bring such a challenge to the constitutionality of this Act.

In *Raines v. Byrd*,[21] the Supreme Court was presented with a challenge to the Line Item Veto Act, brought by several members of Congress who argued that the Act unconstitutionally diluted their voting power by allowing the president to strike individual provisions of spending bills. The Supreme Court, however, declined to rule on the merits of the constitutional challenge and dismissed the suit after concluding that the members of Congress had not suffered sufficiently concrete, individual harm to provide them with standing under Article III of the Constitution.

In *Raines*, the members argued that they had been concretely harmed because the Line-Item Veto procedure created by the Act had made their votes on future spending bills "less effective than before, and that the meaning and integrity of their vote" had been diminished.[22] The Supreme Court, however, viewed those claims as alleging an "institutional injury [that] is wholly abstract and widely dispersed," and concluded that the members challenging the Act lacked a sufficient personal stake in the dispute and had not alleged a sufficiently concrete injury to have established Article III standing.[23]

[20] U.S. Constitution Article VI, Clause 3; 5 U.S.C. § 3331
[21] 521 U.S. 811 (1997)
[22] *Raines*, 521 U.S. at 825.
[23] *Id.* at 829-30.

Members of Congress seeking to challenge S. 160 may be able to allege a more concrete injury than was possible in *Raines*. A member could, for example, argue that his or her individual vote was effectively diluted by the addition of a member for the District that is not authorized by the Constitution. Given the high bar for legislator standing set out in *Raines*, however, it is far from assured that the Supreme Court would accept such a claim as sufficient to present a "case or controversy" for purposes of Article III.

Dilution of a member's vote is not the only theory under which standing to challenge S. 160 could be established, but the more secure alternatives are practically barred by partisan politics. The federal courts have repeatedly found that a legislative body has a personalized and concrete interest in ensuring the lawfulness of its composition.[24] But such a challenge must be brought by the legislative body itself. Given the position of the Democrats on S. 160, and the majority position held by the Democrats in both Houses of Congress, such a challenge to test the constitutionality of S. 160 is extraordinarily unlikely until control of the House changes hands.

The practical consequence of this analysis is that Senators cannot simply assume that the Supreme Court will be able to examine and rule on the constitutionality of S. 160. The vote of this Congress, and the all-but-inevitable signature of the president on the resulting bill, may stand as the last authoritative finding on the constitutionality of S. 160.[25] "Leaving the question for the courts" is never a responsible exercise of legislative authority, but it is particularly irresponsible in the situation currently before us.

The Framers Intentionally Created the District to Serve as the Seat of the Federal Government, and Their Design Should Not be Discarded Lightly

The Founders' Purpose in Creating the District

Proponents of S. 160—and of full congressional representation for the District in general—often claim that the District's lack of full representation was a historical accident or an oversight on the part of the Framers and the Congress. The historical record, however, shows this to be false.

The decision to create a federal enclave as the seat of the federal government, and to locate it between Maryland and Virginia, was the subject of considerable discussion at the time of the Founding. The Framers became particularly sensitive to a need for an independent seat of government not beholden to any state after an incident in 1793, in which a mob of Revolutionary War veterans seeking back pay menaced the members of Congress meeting in Philadelphia. Congress' appeals for aid to Pennsylvania state authorities went unanswered, and although the

[24] *U.S. House of Representatives v. U.S. Dept. of Commerce*, 11 F. Supp. 2d 76, 86-87 (D.D.C. 1998) (citing *Sixty-Seventh Minnesota State Senate v. Beens*, 406 U.S. 187 (1972)).

[25] Note that eventual change in the majority party does not guarantee that the constitutionality of this legislative creation of a House seat for a non-state territory will be assessed by the courts in the more distant future. The belated challenge to the retrocession of the western parts of the District to Virginia, 29 years after the retrocession took place, provides an instructive example. In *Phillips v. Payne*, 92 U.S. 130 (1875), the Supreme Court allowed the retrocession to stand without ruling on the constitutionality of the retrocession itself, essentially treating it as a *fait accompli*. The Court noted that the federal government and Virginia were both satisfied with the retrocession, and ruled that no third-party had standing to complain. If standing problems and partisan control of the House by Democrats foils any legal challenge this bill for a number of years, there is a very real risk that this action will also be seen as a *fait accompli*, and no judicial review will ever occur.

crisis was eventually resolved without violence, the experience impressed upon the Framers the absolute necessity of establishing a seat for the federal government which would not be at the mercy of any state.[26]

In Federalist No. 43, James Madison explained that an independent federal seat would protect both the states and the federal government. Should the national capital be located in a state, the federal government could become overly dependent on the state. Without complete federal authority over the national capital, "the public authority might be insulted and its proceedings be interrupted, with impunity."[27] Perhaps more importantly, however, placing the federal seat in a particular state could upset the equilibrium among the states in the Union and gradually render the federal government a hostage to the host state:

> [A] dependence of the members of the general government on the State comprehending the seat of the government, for protection in the exercise of their duty, might bring on the national councils an imputation of awe or influence, equally dishonorable to the government and dissatisfactory to the other members of the Confederacy. This consideration has the more weight, as the gradual accumulation of public improvements at the stationary residence of the government would be both too great a public pledge to be left in the hands of a single State, and would create so many obstacles to a removal of the government, as still further to abridge its necessary independence.[28]

These concerns for federal autonomy and equilibrium among the states explain the Founders' conscious decision to locate the federal government in an independent enclave that would *not* have the powers, such as seats in the federal legislature, that were assured to the states.

The Historical Record Demonstrates that the Founders Consciously Excluded the District from Congressional Representation

Contrary to the claims of some, the historical record shows that the District's exclusion from congressional representation was not an oversight. Indeed, the question of congressional representation for the District was raised by no less a key figure of the founding era than Alexander Hamilton, who recognized that the proposed Constitution did not provide congressional representation for residents of the District that was to house the federal government, and who offered, at the critical New York ratifying convention, an amendment to Article I of the Constitution that would have provided for such representation:

> That When the Number of Persons in the District of Territory to be laid out for the Seat of the Government of the United States, shall according to the Rule for the Apportionment of Representatives and Direct Taxes Amount to [left blank] such District shall cease to be parcel of the State granting the Same, *and Provision shall be made by Congress for their having a District Representation in that Body*.[29]

Hamilton's proposed amendment was rejected.

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[26] For a detailed account of the confrontation in Philadelphia, *see* 25 Journals of the Continental Congress 1774-1789, at 973 (Gov't Printing Office 1936) (1783).
[27] The Federalist No. 43 (Madison, J.).
[28] *Id.*
[29] *The Papers of Alexander Hamilton* 189-90 (Harold C. Syrett ed., 1962) (emphasis added).

Nor was Hamilton alone. Historical documents from other states confirm that those who ratified the Constitution understood that it did not provide congressional representation for the District and that establishing such representation would require a constitutional amendment.[30] Contrary to the claims of some proponents of S. 160, the Framers did, in fact, understand that the District would not have congressional representation under the Constitution, and they chose that structure consciously.

Modern Experience Shows the Wisdom of the Framers' Choice

Proponents of a policy change to provide full voting representation for the District argue that the *status quo* leaves 600,000 District residents without a voice in Congress, and that this is an unacceptable state of affairs for the capital city of the world's leading democracy. Their arguments would have more force if, in fact, residents of the District were as voiceless as they contend. Fortunately for the District, however, these claims are vastly overstated, and while this legislation has serious constitutional implications, it does little of substance for District residents.

Since 1970 the District has voted for a Delegate who represents them in the House of Representatives.[31] This Delegate can introduce legislation, serve on standing congressional committees, serve on conference committees, vote on these committees, debate on the floor of the House, and vote in the Committee of the Whole.[32] The Delegate therefore has the ability to participate effectively in the legislative process.

District Delegate Eleanor Holmes Norton is justly proud of the influence she has had in Congress. For example, the District receives over double the amount of federal aid *per capita* than the national average.[33] In the recent stimulus bill, for example, calculations released by the Speaker of the House show the District received more federal aid than seven states, all but one of which has a larger population than the District. Indeed, the District received more aid even than Vice President Biden's home state of Delaware, even though Delaware has a population 50 percent larger than the District's. In the 110th Congress alone, Delegate Norton introduced 55 individual pieces of legislation, 37 percent of which became law, and 13 of which passed the House or had hearings. These impressive numbers have earned the District Delegate recognition as the 19th "most influential" member of the House and 16th in "legislative power" according to rankings published *Roll Call* and Congress.org. This impressive track record contradicts the complaints that District residents' interests are not well represented in Congress.

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[30] For more on the early discussions regarding congressional representation for the District at the time of the founding, *see* John Elwood, Testimony Before The Subcommittee On The Constitution, Civil Rights, And Property Rights, Senate Committee On The Judiciary, May 23, 2007. *See also* 10 Annals of Congress 991, 998-99 (1801) (remarks of Representative John Dennis of Maryland) (stating that because of District residents' "contiguity to, and residence among the members of [Congress]," that "though they might not be represented in the national body, their voice would be heard. But if it should be necessary [that they be represented], the Constitution might be so altered as to give them a delegate to the General Legislature when their numbers should become sufficient"); 5 *The Documentary History of the Ratification of the Constitution* 621 (Merrill Jensen, John P. Kaminski & Gaspare J. Saladino eds., 1976) (statement by Samuel Osgood, a delegate to the Massachusetts ratifying convention, that he could accept the Seat of Government provision only if it were amended to provide that the District be "represented in the lower House," though no such amendment was ultimately included in the amendments recommended by the Massachusetts convention).

[31] P. L. 91-405, 84 Stat. 845, September 22, 1970.

[32] H.J. Res. 78, Jan. 24, 2007.

[33] http://www.census.gov/prod/2008pubs/fas-07.pdf

The explosion in the size of the federal government in modern times also demonstrates the Founders' prescience in their concern that the federal government and the seat of government might become inextricably co-dependent. Large portions of the District infrastructure are now an essential part of the mechanics of the federal government. Even though the federal government's physical presence extends throughout the nation, the role of the District is clearly dominant. Treating the District as a state, or providing the District a seat in Congress would introduce into the national legislature a member with far greater power over the activities of the national government than could be exerted by any other state.

Conclusion

The quest for full voting representation has long been a celebrated cause for the residents of the District. Proponents of such representation argue that it is incongruous for the capital city of a nation founded in part out of complaints over "taxation without representation" to itself be subject to taxation without a full voting presence in at least one of the Houses of Congress. Nevertheless, the historical record shows that this state of affairs was not a historical oversight, but rather a conscious choice made by the founding generation out of concerns for the right relationship of the federal and state governments, with the aim of protecting the liberty of states and their citizens, as well as the integrity of the government created from their Union. Absent compelling reasons, the arrangement established by the Founders should not be cast aside.

Modern experience does not provide such compelling reasons to second-guess the Framers. The District of Columbia Delegate in the House has an exceptional record of legislative success, and District residents are the recipients of federal largesse far out of proportion with their population. Converting the Office of the Delegate into a full voting seat as a member of the House would be a primarily symbolic change.

S. 160 would effect this symbolic change in a way that facially violates the Constitution. Members of Congress cannot elide their constitutional responsibility by voting to approve such legislation while hoping that the judicial branch will defend the Constitution in subsequent litigation. Such a gambit is particularly unwise where, as here, there is a genuine risk that the constitutional requirements for standing to sue in federal court could bar the Supreme Court from ruling on the important constitutional problems created by this bill.